SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

IN THE MATTER OF AUGUST J. WOERNER, REMONSTRATOR AND ON BEHALF OF ALL OTHER REMONSTRATORS, AGAINST THE ANNEXATION OF THE TOWN OF WOODRUFF PLACE, INDIANA,
Appellants.

v.

CITY OF INDIANAPOLIS,
Appellee.

No. 662

PETITION FOR WRIT OF CERTIORARI TO INDIANA SUPREME COURT

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INDEX

Page

(Provided for the convenience of the Court, since the Petition is less than 10 pages (See Rule 39-3) See also further index of Exhibits at page ——)

Motion for Authority to File Petition For Certiorari 1

Petition For Writ of Certiorari 3-11

Certificate and Acknowledgments of Service of Documents 33-34

APPENDIX INDEX

Exhibit A, Appendix, Decision and Opinion Indiana Supreme Court 12-24

Exhibit B, Appendix, Judgment of trial Court 25-26

Exhibit C, Appendix, Special Ordinance No. 11-1953 27

Exhibit D, Acts of 1905, as Amend. 28-31

Exhibit E, Appendix, Chronological History of Special Ordinance No. 11-1953, And These Proceedings Pursuant Thereto 32-33

TABLE OF CASES CITED

Statutes Also

14th and 15th Amendments to U.S. Constitution 5

Mahuron v. City of Salem (1950), 120 Ind. App. 247 8

William etc. v. Evansville, 121 Ind. App. 184 9

King v. Bloomington, — Ind. —, 159 N. E. (2d) 563, 570 9

(For Northeastern citations see page designated)

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Appellee.

No. ——

MOTION FOR AUTHORITY TO FILE PETITION FOR WRIT OF CERTIORARI TO ISSUE TO SUPREME COURT OF INDIANA

Comes now Freeman Bradford, attorney for Appellants in the above entitled matter, and respectfully requests leave to file his Petition for Writ of Certiorari to Issue to the Supreme Court of Indiana, in the above matter.

/s/ Freeman Bradford

Freeman Bradford

STATE OF INDIANA
SS:
COUNTY OF MARION

Freeman Bradford, being duly sworn, makes affidavit and says that he is an attorney in good standing, duly admitted to and authorized to practice before the Supreme Court of the United States.

LYNN R. CLUNIE
Notary Public

My Commission expires Jan. 24, 1965.
(Seal)

IN THE

Supreme Court of the United States

IN THE MATTER OF AUGUST J. WOERNER, REMONSTRATOR AND ON BEHALF OF ALL OTHER REMONSTRATORS, AGAINST THE ANNEXATION OF THE TOWN OF WOODRUFF PLACE, INDIANA,
Appellants.

v.

CITY OF INDIANAPOLIS.
Appellee.

No. ———

PETITION FOR WRIT OF CERTIORARI TO ISSUE TO THE SUPREME COURT OF INDIANA

The Petition of Appellants respectfully prays for a writ of certiorari to issue to the Supreme Court of Indiana for a review, by this tribunal, of a decision heretofore rendered by said Court of last resort in the State of Indiana, in connection with an appeal which was taken by these Appellants to that body from a Judgment that was issued by the Marion County Superior Court, Room 2 ("trial Court," or "Court of first instance"), under the docket number of "C-1317"; The Indiana Supreme Court's decision became final on November 2, 1961.

The decision and opinion sought to be reviewed hereby is in The Matter of AUGUST J. WOERNER, REMONSTRATOR AND ON BEHALF OF ALL OTHER REMONSTRATORS AGAINST THE ANNEXATION OF THE TOWN OF WOODRUFF PLACE, INDIANA, Appellants, v. CITY OF INDIANAPOLIS, Appellee, being Docket Number 29971 in the files of the Supreme Court of Indiana,—a copy of which decision and opinion is appended to this Petition and marked Exhibit A; The Judgment originally appealed from by Appellants in Suprerior Court Room 2 is numbered there as No. C-1317 and also appended to this Petition, as Exhibit B.

The Judgment by said trial Court (Exhibit B) was delivered on February 8, 1960 (R. pp. 129-130); A Motion To Modify Judgment (especially referred to hereinafter) was filed by Petitioners on February 15, 1960 (R. pp. 132-137), but said Superior Court denied same on February 24, 1960 (R. p. 139); A Motion For A New Trial was then filed in said trial Court on March 3, 1960 (R. pp. 140-157); Oral argument was subsequently heard by the Court and the Motion For A New Trial was overruled on March 24, 1960 (R. p. 159); Whereupon, Petitioners appealed to the Supreme Court of Indiana (R. p. 160).

On September 19, 1961, the Indiana Supreme Court affirmed the trial Court's said Judgment (Exhibit B); A Motion For A Rehearing was subsequently filed on October 9, 1961; on November 1, 1961, that Motion was denied; and the decision and opinion of the Court of last resort in the State (Exhibit A), herein complained of, at that time became final.

By virtue of 28 USC (1959 Ed.), Secs. 1257 and 2101F, the Supreme Court of the United States has jurisdiction

to issue a writ of certiorari to the Supreme Court of the State of Indiana and review said decision and opinion in connection with the Judgment which it has approved and affirmed, for it is the contention of Petitioners that such proceedings were and are in direct violation of the 14th and 5th Amendments to the Constitution of the United States,—pertinent Sections of which read as follows:

"AMENDMENT 14

1. CITIZENSHIP — DUE PROCESS OF LAW — EQUAL PROTECTION—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"AMENDMENT 5

CRIMINAL ACTIONS—PROVISIONS CONCERNING — DUE PROCESS OF LAW AND JUST COMPENSATION CLAUSES—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation" . . .

On September 9, 1953, the Common Council of the City of Indianapolis enacted Special Ordinance No. 11-1953 (Ex-

hibit C hereto) pursuant to the legislative authority which had been vested in it by the General Assembly of Indiana under the Act of 1905, Section 242 etc., as amend. (See Exhibit D appended hereto) . . . purporting thereby to annex the following described real estate in Marion County, Indiana:

> "All that part of the West Half of the Northeast quarter of Section 6, *Township 16 North*, Range 4 East, which is presently included within the boundaries of the incorporated Town of Woodruff Place" . . . (Our emphasis)

The tract so described in Special Ordinance No. 11-1953 was plain, unambiguous, complete in all of its terms, left nothing to doubt, inference or judicial construction; the description used was by Government Survey, *but it did not embrace any part of the territory of the incorporated Town of Woodruff Place* . . .

For two (2) successive weeks thereafter, i.e. on September 15th and 22nd, due publication according to the Act (Exhibit D) was made in each of two separate, daily newspapers of general circulation throughout Indianapolis and Marion County (R. pp. 176-177), and notice was afforded all interested parties of the property to be annexed; (For a chronological history of Special Ordinance No. 11-1953, and these proceedings, see the appended Exhibit E) . . .

However, the Marion County Superior Court, Room 2, and later, the Supreme Court of Indiana, each learned and judicially knew: (1) that no part of the described real estate was contained within the borders of Woodruff Place; (2) that the Common Council of Indianapolis had failed thereby to comply with the annexation Act (Exhibit D) insofar as Special Ordinance No. 11-1953 and the annexing

of any real estate other than that described and advertised, was concerned; (3) that, as to the Town of Woodruff Place, its property and citizens, the Common Council had acquired thereby neither jurisdiction of subjectmatter nor jurisdiction of the necessary parties, in order to make a valid annexation of any particular territory within the city limits of the Town of Woodruff Place.

Nevertheless, in the Court proceedings that followed, *the Court of first instance* (Marion County Superior Court, Room 2), *first transgressed the rights of Woodruff Place, its citizens and property-owners, by deliberately changing in its Judgment the advertised real estate description of Special Ordinance No. 11-1953, altering it so as to include the entire territory of the Incorporated Town* (February 8, 1960; R. pp. 128-131) . . . Objections were timely made by Motion To Modify the Judgment (Exhibit B) therefor (R. pp. 135-137) which were *denied* and overruled (R. p. 139). Objection was further raised in the Motion For New Trial (R. pp. 144-146); *Overruled* (R. p. 159).

Petitioners contend that such action by the trial Court was without authority and a nullity; that the Superior Court of Marion County had no such power, legislative or otherwise, to revive and revitalize an ineffectual annexation by inserting and substituting into the Court's Judgment a completely new and different description which would encompass the entire territory of the incorporated Town of Woodruff Place; that such was an illegal usurpation of legislative power which the Common Council alone possessed under the annexation Act of 1905, as Amend. (Exhibit D); that, in so doing, the trial Court, in effect, substituted itself for that legislative body, which, by its duly enacted and published Special Ordinance No. 11-1953, had omitted any description of any part of the incorporated

Town of Woodruff Place. . . . *The insertion and description change, is as follows* (See Exhibit B; R. pp. 129-130):

> "IT IS THEREFORE DETERMINED AND ADJUDGED BY THE COURT that Special Ordinance No. 11-1953 of the Common Council of the City of Indianapolis is valid and the area between 10th Street (formerly Collier) on the North, Tecumseh Street on the East, Michigan Street on the South, and the East property line of Arsenal Technical High School on the West, all within the boundaries of the City of Indianapolis, Indiana, being all of the area within the Incorporated Town of Woodruff Place, in Marion County, Indiana, is now and shall hereafter be a part of the territory of the City of Indianapolis" . . .

It is further contended by Petitioners that Woodruff Place and each of its citizens had the right to rely upon the accuracy and validity of the description that was contained in the publication of Special Ordinance No. 11-1953, which was advertised for a total of four (4) separate times in the two (2) daily newspapers of general circulation throughout Indianapolis and Marion County (R. pp. 176-177); that many citizens, particularly those who took no part in the Remonstrance, or in the Representative Suit (Act provision for litigation--Ex. D., Sec. 243), have been lulled into a false sense of security because the description of the land to be annexed, according to the publications, did not embrace his or her property; that to penalize these by the enforcement of a "judicially-cured" *(but legislatively unauthorized, and hence illegal)* annexation description, surely amounts to the taking of property without due process, which is forbidden by the 14th Amendment to the Constitution of the United States (see supra).

In Mahuron v. City of Salem (1950), 120 Ind. App. 247, 91 N. E. (2d) 648, wherein a defective description was at-

tempted to be "cured" by a stipulation of a different description than the one published in the annexation ordinance, holding such to be error, the Court said:

> "A municipal corporation can in no case annex territory without authority conferred by statute or constitutional provisions. The exercise of a grant of legislative power for the annexation of territory must be in strict accord with the statute conferring it; Bradford v. City of Columbus (1948), 118 Ind. App. 408, 78 N. E. (2d) 457; 62 CJS Municipal Corporations, paragraph 43, page 126." . . .
>
> "The stipulation of the City Attorney on behalf of the City could no more change the provisions of a duly adopted ordinance than could an Attorney General by stipulation on behalf of the State modify or vary provisions of statute duly enacted by the legislature."
>
> "Also the voluntary statement of the City Attorney on behalf of the City asking the Court to consider a better description for an annexation which did not follow the description of the land in the original annexation ordinance did not vest the Court with any power to order an annexation of land of a different description and such statement was properly disregarded by the Court" . . .
>
> See also:
>
> King v. Bloomington, - Ind. , 159 N. E. (2d) 563, 570.

In William et al. v. City of Evansville, 121 Ind. App. 184, 98 N. E. (2d) 219, where part of the territory described in the annexing ordinance was already a part of the City, the reviewing Court held that the ordinance was a nullity insofar as that part was concerned . . . Since the entire tract that was specifically described and advertised in Special Ordinance No. 11-1953 was already a part of the City of Indianapolis, the entire description in that annexing Ordi

nance (and the publications) was a nullity and void. Neither the trial Court nor the Supreme Court, in Indiana, possessed the legislative or constitutional authority and power under "Annexation Laws" of that State (Exhibit D), to remodel an otherwise defective description so as to include the incorporated Town of Woodruff Place and thereby revive and transform Special Ordinance No. 11-1953 from a lifeless nullity into a valid and effective instrument for the annexation of that territory.

For all of the foregoing reasons, the Judgment (Exhibit B) of the Court of first instance, as approved and confirmed by the decision and opinion (Exhibit A) of the Court of last resort in Indiana, will forever deprive Woodruff Place, its citizens and property owners, of their rights and property, without due process of law, unless federal protection is afforded each by this tribunal under the authority and provisions of the 14th and 5th Amendments to the Constitution of the United States of America.

WHEREFORE, the premises considered, Petitioners pray a writ of certiorari be directed to the Honorable Chief Justice Harold E. Achor, for and on behalf of the Indiana Supreme Court, requiring that a certified Transcript of the record, which includes all of the proceedings before the Indiana Supreme Court, as well as in the Marion County Superior Court Room 2, in the matter of August J. Woerner, Remonstrator, etc. v. The City of Indianapolis, be sent up to this Tribunal, in order that the errors alleged to have been committed may be considered and corrected; that a stay be ordered pending review, and for all other proper relief.

BRADFORD & INGLES

/s/ FREEMAN BRADFORD

FREEMAN BRADFORD

STATE OF INDIANA
} SS:
COUNTY OF MARION

Sworn and subscribed to this 9th day of January, 1961

LYNN R. CLUNIE

Notary Public

My Commission Expires Jan. 24, 1965.

(Seal)

EXHIBIT A

Decision and Opinion of Supreme Court of Indiana

IN THE

Supreme Court of Indiana

IN THE MATTER OF AUGUST J. WOERNER, Remonstrator and on behalf of all other remonstrators, against the annexation of the TOWN OF WOODRUFF PLACE, INDIANA,

Appellants,

v.

CITY OF INDIANAPOLIS,

Appellee.

No. 29971

APPEAL FROM THE SUPERIOR COURT OF MARION COUNTY, ROOM 2

ROBERT G. ROBB, *Special Judge*

MICHAEL B. REDDINGTON,
Corporation Counsel,
JOHN J. DILLON,
City Attorney,
By: MICHAEL B. REDDINGTON,
Attorneys for Appellee.

L. RUSSELL NEWGENT,
ALBERT W. EWBANK,
Indianapolis, Indiana,
Attorneys for Appellants.

ACHOR, *Judge*

This is an appeal from a decree of annexation by which the Town of Woodruff Place in Marion County was ordered annexed to the City of Indianapolis. The factual background of the case is as follows.

In September, 1953, the Common Council of the City of Indianapolis enacted an ordinance purporting to annex to the City of Indianapolis, the following described real estate:

> "All that part of the West half of the Northeast quarter of Section 6, Township 16 North, Range 4 East, in Marion County, Indiana, which is presently included within the boundaries of the incorporated Town of Woodruff Place."

The residents of Woodruff Place filed a remonstrance to such annexation under the 1949 Act, which was then in effect. Thereafter the cause lay dormant until after the 1955 Legislature enacted an amendment to the 1949 Act. (Burns' Ann. St. § 48-702 (1961 Cum. Supp.)) The remonstrators then filed their petition for a declaratory judgment and injunction against any further proceedings in the case upon the theory that the enabling statute upon which the ordinance was based had been repealed, and therefore that any further action under the ordinance was invalid. In connection with said proceedings the parties filed a stipulation of facts and agreement that the case should be decided upon the merits. After considering the case as thus submitted, the trial court declared the ordinance invalid and enjoined the City of Indianapolis from further proceedings. The City of Indianapolis then appealed the cause and this court reversed the judgment of the trial court and ordered the cause be heard upon the merits of the annexation under the procedures of the 1955 Act (Burns' Ann. St. § 48-

702, supra). *City of Indianapolis v. Wynn* (1959), Ind. , 159 N. E. (2d) 572.

The appellant, August J. Woerner, thereafter petitioned the Superior Court of Marion County, Room 2, to substitute his name as remonstrator for Earl Wynn who had died. which petition was granted.

A change of judge was thereafter granted and Robert G. Robb was selected to try the cause. Thereafter a motion for change of venue from the county was filed by the appellant, which motion was denied. After submission of the cause the court entered a decree of annexation and denied the motion to modify the judgment and the motion for new trial, from which this appeal was taken.

The issues presented by the appellant's assignment of errors are as follows:

1. That the court erred in overruling appellant's motion for new trial.

2. That the court erred in appellant's motion to modify the judgment.

3. That the decision and finding of the court contravenes and is in violation of Art. 1, § 1 of the Constitution of Indiana

4. That the decision and finding of the court contravenes and is in violation of Art. 16, § 2, sub-section 4 of the Constitution of Indiana.

5. That the decision and finding of the court contravenes and is in violation of the Fourteenth Amendment to the Constitution of the United States.

Appellant first argues specifications 1 and 2 of the Motion for New Trial. These are related to the court's refusal to grant a change of venue from the county.

The annexation statute, with reference to a change of venue from the county, provides as follows: "The laws touching change of venue from the county shall not apply, but changes of venue from the judge may be had as in other cases. . . ." Burns' Ann. St. § 48-702, *supra*. However, appellant contends that § 2-1432, Burns' 1950 Repl. (1961 Supp.) is applicable under the circumstances of this case. This section provides for changes of venue from the county on proper application "in every case" where judgments have been reversed in the Supreme or Appellate courts and the case is remanded for new trial. Because of the fact that judgment in the case had been reversed on appeal, appellant contends that he is entitled to change of venue from the county.

We do not so construe the pertinent statutes. The 1947 Amendment to § 2-1432, *supra*, is an amendment to a general statute, enlarging the law with reference to changes of venue from the county. Although there may be general laws enacted with regard to a subject matter, such as the right of change of venue from the county, such statutes are not controlling of special statutory proceedings such as annexation when such special statute contains an express provision that "the laws touching change of venue from the county shall not apply, . . ." § 48-702, *supra*. In such special statutory proceedings which exclude resort to any other or different procedure, the method provided in the statute must be followed. *Wheeler v. City of Indianapolis* (1929), 201 Ind. 415, 166 N. E. 433; *Thorn v. Silver* (1909), 174 Ind. 504, 89 N. E. 943.

We conclude that § 2-1432, *supra*, has no application to the special statutory proceedings with which we are here concerned. Therefore appellant's contention that the denial of appellant's motion for change of venue from the county constituted reversible error is without merit.

All other substantive issues and arguments presented by appellant's motion for new trial and motion to modify the judgment are related to the fact that the ordinance of annexation, and the notices relative thereto, erroneously described the territory sought to be annexed as being Section 6, Township *16* North, Range 4 East, whereas the Town of Woodruff Place is, in fact, located in Section 6, Township *15* North, Range 4 East. This issue was raised in the objections to the admission of evidence. However, it was also vigorously asserted in the motion to modify the judgment. In said motion appellant strongly objected to the fact that the trial court entered a decree of annexation which specifically and *correctly* described "the boundaries of the incorporated town of Woodruff Place" (which term is used in the ordinance of annexation), although the ordinance, if literally construed, describes the territory which was nonexistent.

It is appellant's contention that because of this error in the description of the territory involved, the ordinance of annexation was a nullity from its inception and that being "stillborn" the court had no authority to admit evidence as to the actual boundaries of the Town of Woodruff Place or to alter the description of the territory as described in the ordinance. Appellant argues that such a decree of annexation is contrary to law, for the reason that it purports to annex territory by judicial decree which was not annexed by the ordinance, itself.

Appellant properly asserts that annexation is a legislative and not a judicial function and therefore the court had no authority to decree the annexation of territory to a municipality which had not previously been annexed by ordinance. Therefore, the question with which we are confronted is whether the court could construe the ordinance, as written, to describe the actual boundaries of the Town of Woodruff Place. The law is well settled that the same rules apply to the construction of an ordinance as to a statute. *Zorger v. The City of Greensburgh* (1877), 60 Ind. 1.

We therefore examine the decisions of this court relied on by appellant, as related to the construction of statutes wherein there is an apparent defect or omission in the enactment, which appears to be the result of a clerical or typographical error and by reason of which the enactment, if literally construed, is inoperative or produces an absurd result.

It is true that in the case of *Taylor v. State ex rel.* (1907), 168 Ind. 294, 296-297, 80 N. E. 849, this court stated the general rule of law as follows:

> "In cases of uncertainty or ambiguity, necessitating a construction of statutes, the primary object is to ascertain and give effect to the legislative intention. But, where the language of enactments is free from ambiguity and uncertainty, courts cannot supply defects or omissions in order to carry out more fully the supposed purpose and intent of the legislature. . . ."

See also:

> *Diamond Plate Glass Co. v. Trowell* (1899), 22 Ind. App. 132, 52 N. E. 168.

However, the above cases, which correctly enunciate the *general* rule of statutory construction, do not state the total

law on the subject. Although the general rule is now well established that, where the language of enactments is free from ambiguity and uncertainty, "courts cannot supply defects or omissions in order to carry out more fully the supposed purpose and intent of the legislature." *Taylor v. State ex rel., supra*, nevertheless an exception to the above stated general rule has developed during the last century in the reported cases of this court, so that now the exception is as well established as the rule itself. The exception is demonstrated by an analysis of the cases of the last century which have considered this issue, as follows:

In *State ex rel. v. Bartholomew* (1911), 176 Ind. 182, 191, 95 N. E. 417, this court quoted, with approval, from the earlier case of *Clare v. State* (1897), 68 Ind. 17, 25, which, in part, is as follows:

> "The true rule is, and always has been, as recognized in many decisions of this court, to make the legislative intention in the enactment of the particular statute, the chief guide of the court in its interpretation and construction. If the object, purpose and intention of the legislature, in the enactment of the particular statute, can be fairly ascertained and arrived at, then it is the duty of the court to overlook and *disregard all apparent inaccuracies and mistakes in the mere verbiage or phraseology* of the statute, and, if possible, to give force and effect to the evident reason, spirit and intention of the law. . . .' " (Our emphasis)

Thereafter, in *State ex rel., 1625 E. Wash. R. Co. v. Markey, Judge* (1937), 212 Ind. 59, 65-66, 7 N. E. (2d) 989, this court held that where the title and parts of the body of an act providing for a change of judge and a method of selecting a special judge clearly showed a legislative intent that the provisions apply to both criminal and civil actions,

the court would supply the word "civil" in connection with "criminal" in places where it was omitted, for the purpose of making effectual the obvious legislative intent. In that case the court affirmed the following rule:

> "'Legislative enactments are not more than any other writings to be defeated on account of mistakes, errors or omissions, provided the intention of the legislature can be collected from the whole statute. *Where one word has been erroneously used for another*, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied. This is but making the strict letter of the statute yield to the obvious intent.' 25 R.C.L. Sec. 227, p. 978; *Gustavel v. State* (1899), 153 Ind. 613, 54 N. E. 123."

In *Kos v. State ex rel. Metzler* (1941), 218 Ind. 115, 121, 31 N. E. (2d) 50, it was noted that the words "in excess" in a pension bill were omitted. The court in considering the mistake stated:

> "When the legislative intention in the first instance is plain and clear, and consistent with ordinary rational conceptions, and it is established that by *typographical error* its intention was not correctly reported in the published acts, and where it is so obvious that there is no room for disagreement among reasonable men that the wording of the reenactments followed the published act, rather than the original language of the enrolled act, only because of inadvertence or mistake, courts are not required to perpetrate the error and ascribe to the Legislature an intention which it obviously never had. . . ."

In the recent case of *Town of Homecroft et al. v. Mac Beth* (1958), 238 Ind. 57, 65, 148 N. E. (2d) 563, this court stated:

> "Where it is clear that words have been omitted which are necessary to make the statute workable and to give it complete sense, such may be read into the act to express the true legislative intent. *State ex rel. 1625 E. Wash. Realty Co. v. Markey* (1937), 212 Ind. 59, 7 N. E. (2d) 989."

And the court also stated:

> "We will construe a statute to prevent an absurdity. *Helms v. Am. Security Co.* (1939), 216 Ind. 1, 22 N. E. (2d) 822; *State ex rel. Glenn v. Smith, Trustee et al.* (1949), 227 Ind. 599, 87 N. E. (2d) 813. . . ."

Although in construing the enactment with which we are here presented, we are in no way bound by the decisions of other states. Nevertheless, we note with interest the case of *L., I. & I. R. R. Co. v. The People* (1894), 154 Ill. 558, 566, 39 N. E. 133, 135. In that case the legislature of Illinois enlarged the boundaries of the town of Dwight. However, the act inadvertently described part of the land included within the boundaries of the town as being in Section 9 of a particular township and range, which section was 12 miles distant from the town of Dwight. In that case the Illinois Supreme Court affirmed a decree which described the territory obviously intended by the enactment. The court stated:

> "By mistake the word and figure 'nine' were inserted instead of 'seven.'
>
> In the construction of a statute the main consideration is to ascertain and give effect to the intention of the legislature. . . ."

In the light of the above cited cases we now consider the law to be well settled that although the language employed in the enactment may be technically free from uncertainty

or ambiguity, in construing the acts of the legislature courts may provide minor omissions or make minor substitutions in the enactments of the legislature where (1) such action is necessary in order to give vitality to or prevent absolute absurdity in the acts of the legislature; (2) an omission has occurred or a correction is necessary because of a clerical or typographical error; (3) the legislation, as enacted, was obviously not within the comprehension of the legislative body, and (4) the legislative intention, with respect to the enactment, is clear.

With respect to the case before us, in the ordinance under consideration there was a clear and manifest intention on the part of the City Council of the City of Indianapolis to annex the territory "within the boundaries of the incorporated Town of Woodruff Place," in Marion County, Indiana, and it is obvious that there was a clerical or typographical error with respect to the number of the township described therein. The Town of Woodruff Place had boundaries which were legally established and readily ascertainable. Under the circumstances of this case, to ask this court to place a construction upon the ordinance under consideration, which would limit its application to non-existent territory rather than to the territory "presently included within the Town of Woodruff Place," in Marion County, is to ask this court to require a construction of the ordinance, which would be absurd in that such a construction would be obviously and incomprehensibly inconsistent with the manifest intention of the enacting authority. This we will not do, at least we will not do so intentionally!

Next we consider whether the issue above presented may have been waived. In considering this issue, we are first presented by the fact that a party who intervenes in a case

must accept the case as he finds it at the time of his intervention therein. *Boone County Rural E. Mem. Corp. v. Public Serv. Comm.* (1959), — Ind. —, 159 N. E. (2d) 121; *Abeele v. Ruse* (1942), 112 Ind. App. 596, 44 N. E. (2d) 235. In the case before us it must be considered that the residents of the Town of Woodruff Place who remonstrated to the annexation ordinance, including the appellant's predecessor in interest, by their complaint or remonstrance, acquiesced to the fact that the ordinance of annexation annexed all the territory "presently included within the boundaries of the incorporated Town of Woodruff Place," in Marion County. Later these remonstrators, who are property owners within the Town of Woodruff Place, stipulated to the fact of the ordinance of annexation and that they were proper persons within the territory sought to be annexed, and that the trial of the case would be presented upon the merits. Thus they had waived any mere technicalities as to the description of the territory being annexed at the time of the intervention of the appellant Woerner. The appellant cannot, at this late date, intervene and for the first time assert issues which are technical in nature, such as typographical or clerical errors in the description of the real estate involved, after such issues have been waived in the proceedings as previously held.

Furthermore, as heretofore stated, one of the grounds asserted by appellant in his motion to modify the judgment is that the court's decree of annexation described "boundaries of the incorporated Town of Woodruff Place" by specific metes and bounds, which description and method of description is different and more specific than that contained in the ordinance of annexation. Appellant asserts that this action by the trial court constitutes judicial legislation and is therefore contrary to law.

If the decree *correctly* described the territory, although in language different from the ordinance, appellant is not harmed thereby under our ruling, with respect to the validity of the ordinance. Furthermore, if the territory annexed was described in the ordinance sufficiently to conform to the requirements of notice, and it is so described that it can be identified from intrinsic records by one skilled in such matters, the description may be considered sufficient for the purpose of the particular proceedings. However, it is always proper and desirable that the court, in entering a decree which effects the transfer of real estate, describe the territory involved with the greatest possible clarity and certainty, even though a more complete description requires language different than that used in the complaint or enactment by which the proceeding was instituted. See *Hagemann v. City of Mount Vernon* (1958), — Ind. —, 154 N. E. (2d) 33. Appellant's argument upon this issue is therefore without merit.

Finally we consider the question as to whether or not, as contended by appellant, the annexation of the Town of Woodruff Place violated the constitutional rights of the residence thereof by depriving them of their property rights within the Town of Woodruff Place, contrary to the constitutional provisions hereinbefore cited. There is no merit to this contention. Subordinate divisions of the government are but parts of the state government as a whole. The state, by its legislature, may abolish, consolidate, combine, eliminate, or create new governmental corporations, or authorize such alterations to govern those who live in a given area. There is no constitutional guarantee for the continued existence of a governmental subdivision of the state. They are all creatures of the legislature. 62 C.J.S.

Municipal Corporations § 47 (1949), Rhyne, Municipal Law § 2-26 (1957).

For the reasons hereinbefore stated, judgment is affirmed.

Landis, C. J., Arterburn and Bobbitt, JJ., concur.

Jackson, J., concurs in the result.

EXHIBIT B

Judgment Referred to Herein and Rendered by Marion County Superior Court, Room 2, on February 8, 1960

JUDGMENT

(Omitting Formal Parts)

Comes now the parties by counsel, and certain of the remonstrators against annexation in person, and the parties having stipulated the existence of a sufficient remonstrance, this cause is now submitted without the intervention of a jury on remonstrators appeal petition from the annexation ordinance and the defendant City's answer thereto on the question of the annexation's merits pursuant to the instruction of the Supreme Court of Indiana in the case of City of Indianapolis et al. v. Wynn et al., petitions and remonstrators against the annexation of the Town of Woodruff Place, in Indiana, No. 29724.

Now the Court having heard the evidence and the argument of counsel and having taken the same under advisement, finds from the evidence that all the statutory determinants for the annexation have been demonstrated and that said annexation should take place.

It Is Therefore Determined And Adjudged By The Court, that Special Ordinance No. 11, 1953, of the Common Council of the City of Indianapolis is valid and the area between 10th Street (formerly Collier) on the North, Tecumseh Street on the East, Michigan Street on the South, and the East property line of Arsenal Technical High School on the West, all within the boundaries of the City of Indianapolis, Indiana, being all the area within the Incor

porated Town of Woodruff Place in Marion County, Indiana, is now and shall hereafter be part of the territory of the City of Indianapolis.

The Clerk of this Court is directed and ordered to deliver a certified copy of this Judgment to the Clerk of the City of Indianapolis who shall pursuant to statute record the same in the City's ordinance record and make cross reference to the page thereof upon the margin where such original ordinance was recorded.

Judgment for the costs of this action is rendered against the plaintiffs, the remonstrating petitioners herein.

/s/ ROBERT G. ROBB
Special Judge, Marion County
Superior Court, Room 2.

Inspected by and Delivered 2-8-60
to Russell Newgent
Albert Ewbank
Attorneys for Remonstrators
But not signed by them
/s/ MICHAEL B. REDDINGTON
For Defendant

(R. p. 129-130)

EXHIBIT C

The Special Ordinance Enacted by the Common Council of the City of Indianapolis

SPECIAL ORDINANCE, NO. 11-1953

An Ordinance annexing certain contiguous territory to the City of Indianapolis, and fixing a time when the same shall take effect.

BE IT ORDAINED BY THE COMMON COUNCIL OF THE CITY OF INDIANAPOLIS, INDIANA:

Section 1. That the City of Indianapolis, Indiana, be and the same is hereby extended so as to include the following described territory, which is hereby annexed to and made a part of the territory constituting the City of Indianapolis, Indiana, and described as follows:

> All that part of the West Half of the Northeast quarter of Section 6, Township 16 North, Range 4 East, in Marion County, Indiana, which is presently included within the boundaries of the incorporated Town of Woodruff Place.

Section 2. This ordinance shall be in full force and effect from and after its passage, approval by the Mayor, and publication according to law. . . .

EXHIBIT D

Applicable Statutes Referred to Hereinbefore, Acts of 1905, Chapter 129, Sections : 42, Etc.

ANNEXATION OF TERRITORY OF CITIES AND TOWNS

242. CORPORATE BOUNDARIES — ANNEXATION OF LANDS—The Common Council shall have the power, by ordinance, to declare and define the entire corporate boundaries of such city, and such ordinances, properly certified, shall be conclusive evidence, in any court or proceeding, of the boundaries of such city, except as provided in the next section. Such ordinances defining the entire city boundary may include contiguous territory, whether platted or not, not previously annexed (and such annexation shall be binding, unless such newly annexed territory shall be within the limits of another town or city, in which case there may be an appeal, as hereinafter provided). Said Common Council may also, by separate ordinance, not purporting to define the entire boundaries of such city, annex contiguous territory, whether platted or not, to such city, and a certified copy of such ordinance shall be conclusive evidence in any proceeding that the territory therein described was properly annexed and constitutes a part of such city, except as provided in the next section. Immediately after the passage of every such ordinance as is provided for in this section, the same shall be published for at least two (2) consecutive weeks in a daily newspaper of general circulation published in such city. (Acts 1905, Ch. 129, Sec. 242, p. 219; § 48-701 Burns' Ann. Sta. 1950 Repl.).

242½. PETITION FOR ANNEXATION PROCEDURE — Etc. . . . (Not Applicable Herein)

243. REMONSTRANCES AGAINST ANNEXATION PROCEDURE — FIRE PROTECTION AND OTHER SERVICE—AGREEMENT FOR OR COURT ACTION IN REGARD TO—Whenever such territory is annexed to such city as provided in the foregoing sections, whether by general ordinance defining the city boundaries, or by special ordinance for the purpose of annexing territory, an appeal may be taken from such annexation by one (1) or more persons deeming himself or themselves aggrieved, or injuriously affected, filing their remonstrances in writing against such annexation, together with a copy of such ordinance, in the circuit or superior courts of the County where such territory is situated within thirty (30) days after the last publication provided for in the preceding section; such written remonstrance or complaint shall state the reason why such annexation ought not in justice take place. Notice of such proceedings, by way of summons, shall be served upon the proper officers of the city seeking to make annexation, and such city shall become defendant in such cause, and shall be required to appear, and answer as in other cases. The Court shall thereupon proceed to hear and determine such appeal without the intervention of a jury, and shall give judgment upon the question of such annexation according to the evidence which either party may introduce revelant to the issue. If the court should be satisfied upon the hearing of (that) less than fifty-one (51) per cent of the persons owning property in the territory sought to be annexed, have remonstrated, and that the adding of such territory to the city will be for its interest and will cause no manifest injury to the persons

owning property in the territory sought to be annexed, he shall so find and said annexation shall take place. If the court shall be satisfied that fifty-one (51) percent or more of the persons owning property in the territory sought to be annexed, have remonstrated, then such annexation shall not take place, unless the court shall find from the evidence that the prosperity of such city and territory will be materially retarded and the safety of the inhabitants and property thereof endangered without such annexation. In case the court shall so find, the annexation shall take place, notwithstanding the remonstrance. The laws touching change of venue from the county shall not apply. But changes of venue from the judge may be had as in other cases. Costs shall follow judgment. Pending such appeal, and during the time within which such appeal may be taken, such territory sought to be annexed shall not be deemed a part of the annexing city. Upon the determination of such appeal, the judgment shall particularly describe the ordinance upon which the appeal is based, and it shall be the duty of the county clerk to forthwith deliver a certified copy of such judgment to the clerk of such city, who shall record the same in the ordinance record, and make a cross-reference to the page thereof upon the margin where such original ordinance was recorded. In case the decision is adverse to such annexation, no further annexation proceedings for such territory shall be lawful for two (2) years after the rendition of such judgment: PROVIDED, That in case any incorporated town or city shall be located within the corporate limits of such other city and not annexed as contemplated in this act, such incorporated town or city so located as aforesaid, shall not be entitled to have or receive from such incorporated city within which it is located, any fire or police protection, until such minor town

or city shall first have entered into a contract or agreement with the city within which it is located, binding such minor corporation to pay a reasonable compensation to be agreed upon mutually by such corporate authorities. The same regulation shall apply to sweeping, cleaning and sprinkling service, and to sewer privileges: PROVIDED, That if the corporate authorities of such municipalities can not mutually agree as to the compensation to be paid for such services, and privileges, by such minor town or city, either of such municipal corporations may by petition present the matter to the judge of the circuit court of the county in which such municipalities are located, who shall cause such other town or city to be notified of such petition, and require the same to answer thereto, and shall have jurisdiction on such applications to hear and determine such matter and determine and fix such reasonable compensation, and his adjudication shall be final. The cost of such proceeding shall be paid by the municipality making such application . . . (Act 1905, Ch. 129, Sec. 243, p. 219; 1935, Ch. 153, Sec. 1, p. 550; 1949, Ch. 216, Sec. 2, p. 701; Sec. 48-702 Burns' Ann. Stat., 1950 Repl.)

EXHIBIT E

CHRONOLOGICAL HISTORY

1. *September 9, 1953:* Special Ordinance No. 11-1953 enacted. It was subsequently approved and signed by the Mayor, and then published in the newspapers on or about September 15th and 22nd.

2. Remonstrators filed petition according to requirements of Act of 1905, as amended (Exhibit D); by stipulation it was conceded the remonstrance contained more than 51% of property owners in Woodruff Place, and thereafter matter lay dormant for some time.

3. In the meantime, the 1955 legislature amended Acts of 1905. Remonstrators file complaint for Declaratory Judgment and injunction against annexation; the complaint was sustained by the trial court; Special Ordinance No. 11-1953 was held to be invalid, and the City was enjoined from proceeding further with the proposed annexation; An appeal was taken by the City to the Supreme Court of Indiana, which reversed the holding in the Declaratory Judgment action and ordered hearing on the merits under annexation by Special Ordinance No. 11-1953;

4. *February 8, 1960:* Judgment rendered declaring Special Ordinance No. 11-1953 to be a valid annexation of the Woodruff Place territory, correcting the defective description so as to properly describe Woodruff Place.

5. *February 15, 1960:* Motion to Modify Judgment (R. pp. 132-137) filed and denied on February 24, 1960 (R. p. 139).

EXHIBIT E (Cont.)

6. *March 3, 1960:* Motion For New Trial (R. pp. 140-157) filed; denied (R. p. 159) after argument on same. Judgment became final, and Appeal was taken to the Supreme Court of Indiana (Court of last resort in Indiana) (R. p. 160).

7. *September 19, 1961:* Supreme Court affirmed lower Court's Judgment.

8. *October 9, 1961:* Motion For Rehearing filed; denied on November 1, 1961. Decision became final on November 1, 1961.

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

CERTIFICATE OF SERVICE

I hereby certify that I have, this day, served the foregoing document on Michael B. Reddington, corporation counsel, City of Indianapolis, City Hall, Indianapolis, Indiana, and John J. Dillon, City Attorney, City of Indianapolis, City Hall, Indianapolis, Indiana, by personally delivering to each one a copy of said document in accordance with Rule 33, Paragraph 1, as evidenced by their respective signatures and receipts hereto, this 10th day of January, 1962.

/s/ FREEMAN BRADFORD

FREEMAN BRADFORD, *Attorney*

Receipt acknowledged this —— day of ———, 1962.

_____

_____

Subscribed and sworn to before me, a Notary Public, in and for said county and state this —— day of ———, 1962.

_____

Notary Public

My Commission Expires ———

_____

Office-Supreme Court, U.S.
FILED
FEB 5 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

IN THE MATTER OF AUGUST J. WOERNER, REMONSTRATOR AND ON BEHALF OF ALL OTHER REMONSTRATORS, AGAINST THE ANNEXATION OF THE TOWN OF WOODRUFF PLACE, INDIANA,
Appellants.

v.

CITY OF INDIANAPOLIS,
Appellee.

CAUSE
No. 662

BRIEF IN OPPOSITION TO APPEAL FOR WRIT OF CERTIORARI

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IN THE

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IN THE MATTER OF AUGUST J. WOERNER, REMONSTRATOR AND ON BEHALF OF ALL OTHER REMONSTRATORS, AGAINST THE ANNEXATION OF THE TOWN OF WOODRUFF PLACE, INDIANA, *Appellants*,	CAUSE No. 662
v.	
CITY OF INDIANAPOLIS, *Appellee*.	

BRIEF IN OPPOSITION TO APPEAL FOR WRIT OF CERTIORARI

The Appellee, as to the contention of the Appellants that the action of the Supreme Court of Indiana and of the trial Court (the Superior Court of Marion County, Indiana) was in violation of the 14th and 5th Amendments of the Constitution of the United States, in that the description used in annexation proceedings did not embrace any part of Woodruff Place and that the Court in so determining that it did, transgressed the right of the Appellants, thereby judicially curing but in so doing violating legislatively

due process of law, answers that such contention is not borne out by the facts of the case.

The description of the ordinance (Brief p. 27). The Courts decision in the trial Court (Brief p. 25), and Judgment of the Supreme Court of Indiana (Brief p. 21), refers to the territory as "all that * * * * * within the Incorporated Town of Woodruff Place". There was no variance anywhere.

The Appellee states that there is no compelling reason why this cause should ever be reviewed by the Supreme Court of the United States.

The Indiana Statute, Burns' R.S. vol. 9, pt. 1, Sec. 4-8703, involving such annexation is as follows:

> No such annexation shall be made, under the foregoing section of a part of the territory of any other incorporated town or city, but only of the whole corporate territory thereof. In case of such annexation, the two corporations shall be deemed to be consolidated, and the consolidated corporation shall be bound for all the debts and liabilities, and shall be the owner of all corporate property, franchises and rights of every nature, of both of such municipal corporations: Provided, however, that no city or town having a population of one thousand seven hundred (1,700) or more as shown by the last preceding United States census shall be annexed under any of the provisions of Sections 242 (s 48-701), and 243 (s 48-702) of this Act. The consolidation of two or more cities or of two or more towns or of a city and town or of cities and towns each having a population of one thousand seven hundred (1,700) or more, as shown by the last preceding United States census shall only take place in accordance with the provisions of section 241 (s 48-601) of this Act. (Acts 1905, ch. 129, s 244, p. 219; 1913, ch. 21, s 1, p. 30; 1945, ch. 209, s 1, p. 969.)

That there appears in the record of this Cause, a certification by the United States Department of the Census that the population of Woodruff Place at the time of its annexation was (about) one thousand five hundred (1,500) persons.

The matter brought before the Court is most minor. Appellee's contention is that the entire record discloses only a typographical error in a City Ordinance which misled no one and which the Appellant waived below. (Opinion Ind. Supreme Court Brief p. 22.)

Out of this set of facts there arises no Federal question of substance not heretofore determined by the Supreme Court of the United States. The Indiana decision in the Supreme Court of that State was decided entirely conformable to numerous applicable decisions of the Supreme Court of the United States.

The question involved is one of statutory interpretation. In statutory construction where one word has erroneously been used for another in a Statute, the proper word will be deemed substituted or supplied and Courts will not permit statutory construction which will result in absurd consequences, and this rule of law is supported by the overwhelming precedents of the Supreme Court of the United States.

Haggar Co. v. Helvering, Tex., 60 S. Ct. 337, 308 U. S. 389, 84 L. Ed. 340, mandate conformed to, C. C. A., Haggar Co. v. C. I. R., 111 F. (2d) 144, (3);

U. S. v. Ryan, Mont., 52 S. Ct. 65, 284 U. S. 167, 76 L. Ed. 224 reversed, U. S. v. Anderson, 52 S. Ct. 125, 284 U. S. 584, 76 L. Ed. 505, (7).

The precedents cited by the Supreme Court in Indiana in regard to statutory or Ordinance construction, in its decision reported at 177 N. E. (2d) 34, are entirely conformable to the precedents of the Supreme Court of the United States.

State ex rel. v. Bartholomew (1911), 176 Ind. 182, 191, 95 N. E. 417;
Clare v. State (1897), 68 Ind. 17, 25;
Gustavel v. State (1899), 153 Ind. 613, 54 N. E. 123;
Kos v. State ex rel. Metzler (1941), 218 Ind. 115, 121, 31 N. E. (2d) 50;
Town of Homecroft et al. v. MacBeth (1958), 238 Ind. 57, 65, 148 N. E. (2d) 563.

Annexation or regrouping of inter governmental units within a State or the fact that those in regrouped or annexed territory will be subject to additional taxation or similar objections, has been held to constitute no violation of the Federal constitution by the Supreme Court of the United States and does not amount to any taking of property without due process.

Town of Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. Ed. 699, affirming Beckwith v. City of Racine, Fed. Cas. No. 1,213, 7 Biss. 142;
Clark v. City of Kansas City, 20 S. Ct. 284, 176 U. S. 114, 44 L. Ed. 392.

WHEREFORE, for the foregoing reason the Appellee, City of Indianapolis, in opposition to the application for certiorari, opposes the same, contends that no Federal question of Substanee is involved and respectfully requests that

the Supreme Court of the United States deny the application for a review by way of certiorari.

MICHAEL B REDDINGTON

MICHAEL B. REDDINGTON,
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Feb. 7, 1962

CHARLES S RHYNE